Lewis University and Faculty Life Committee of the College of Arts and Sciences, Petitioner

Faculty Life Committee of the College of Arts and Sciences, and Lewis University, Petitioner. Cases 13-UC-126 and 13-UC-130

December 16, 1982

DECISION AND ORDER

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Robert Perkovich. Thereafter, the Regional Director for Region 13 transferred this proceeding to the National Labor Relations Board for decision, pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8, as amended. Lewis University, the Employer, and the Faculty Life Committee of the College of Arts and Sciences, the Union, filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Upon the entire record in this case, including the briefs, the Board finds:

1. Lewis University is a private, nonprofit institution of higher education with offices and educational facilities located in Romeville, Illinois. The parties stipulated that during the past year the University had gross annual revenues in excess of \$1 million and that at least \$50,000 of that amount originated outside the State of Illinois.

The Employer contends that in light of N.L.R.B. v. The Catholic Bishop of Chicago, the Board's exercise of jurisdiction would violate the freedom of religion clause of the first amendment of the United States Constitution. We do not agree.

First we do not believe that Catholic Bishop prevents the Board from asserting jurisdiction because, as we have stated before, Catholic Bishop applies only to parochial elementary and secondary schools, not to institutions of higher learning such as Lewis University. College of Notre Dame, 245 NLRB 386 (1979), and Barber-Scotia College, Inc., 245 NLRB 406 (1979). Furthermore, for the reasons set forth below, we conclude that Lewis University is not church-operated as contemplated by Catholic Bishop, and that the Board clearly has statutory jurisdiction over the Employer.

The Employer was initially established through the efforts of contributing Catholic laypersons and the Archdiocese of Chicago in 1930. The Employer was chartered by the State of Illinois in 1934, as a nonprofit institution and, at that time, operated as a technical high school under the authority of the Bishop of the Archdiocese of Chicago. Then, in 1959, the newly formed Diocese of Joliet assumed ownership of the Employer's land and buildings and responsibility for the Employer's affairs. The Diocese of Joliet placed the daily running of the University's affairs under the control of the Brothers of the Christian Schools (herein the Order), a Catholic religious teaching order. The Order operated the University until 1974 when it transferred its authority and title to the land to a private board of trustees.2

The board of trustees consists of 19 individuals who have no relationship with the University other than their membership on the board of trustees, and the provincial of the Order, who is the chairperson. The president of the University and a representative of the diocese are ex-officio members. While the bylaws of the University provide that a majority of the trustees must be members of the Order, the Order is not currently exercising this right, as only 7 of the 19 trustees are members of the Order.

The Roman Catholic Diocese of Joliet does not exercise administrative or other secular control over the Employer, and it does not own any land or other property used by the school. No services are performed for the Employer by the Diocese. In addition, the board of trustees formulates the curriculum, hires the faculty, establishes faculty and student handbooks, develops the school's personnel policies, and formulates its own budget, all without the participation of the Diocese.

Further, while the Order is currently party to a contract with the University, the contract covers only items such as salary and rent to be paid by the University on buildings it uses which are owned by the Order. Neither the Order nor the Diocese has any role in the selection of courses, graduation requirements, or other academic affairs. Moreover, while the students are required to take 6 hours of religious studies as a prerequisite to graduation, the courses satisfying this requirement are not limited to Catholicism. Some scholarships are awarded without respect to the faith of the student. The current president of the Employer, while a member of the Catholic Church, is not a member of any religious order, and faculty members are not required

^{1 440} U.S. 490 (1979).

² This transfer was accompanied by an agreement between the Order and the University that the University would compensate the Order for services and lease certain portions of land to the Order in perpetuity.

to be members of the Catholic Church. Also, there is evidence of aid in several forms provided to the Employer by both the State of Illinois and the Federal Government.³

On these facts we find that the University is not church-operated. For that reason we also find no "significant risk" of constitutionally impermissible entanglement between church and State from our assertion of jurisdiction. Thus, contrary to the Employer's contention, our assertion of jurisdiction does not run afoul of first amendment guarantees.

We find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

- 2. The Employer contends that the Faculty Life Committee of the College of Arts and Sciences is not a labor organization within the meaning of the Act. However, employees participate in it and the purpose of the organization is to bargain collectively with the Employer. Thus, it meets the definition of "labor organization" set forth in Section 2(3) of the Act. See *University of San Francisco*, 207 NLRB 12 (1973), and *Manhattan College*, 195 NLRB 65 (1972). Accordingly, we find that the Faculty Life Committee of the College of Arts and Sciences is a labor organization within the meaning of the Act and seeks to represent certain employees of the Employer.
- 3. The Union has represented a unit consisting of all full-time faculty members in the College of Arts and Sciences including professors, associate professors, assistant professors, and instructors. In light of the Supreme Court's decision in N.L.R.B. v. Yeshiva University, the Employer filed a petition asking the Board to clarify this unit to exclude certain faculty members as managerial and therefore not employees within the meaning of the Act. 5

Background

Lewis University is located in Romeville, Illinois, and enrolls approximately 3,500 students. It comprises three colleges: Business, Nursing, and Arts and Sciences.

The University's chief executive officer is the president. However, the bylaws of the University state that ultimate management authority of the University is vested in the board of trustees. Reporting to the president is the vice president for academic affairs and the vice president for business and finance. Reporting to the academic vice presi-

dent are the academic deans of each of the three colleges. The academic deans are not accorded faculty status and function primarily as the liaison between the faculty and the administration.

The College of Arts and Sciences employs 69 faculty members in 16 departments and 16 programs. Seven of the programs are independent and nine of the programs function within various departments. Each department is composed of faculty members and a chairperson.

Analysis

The primary issue is whether the faculty members at Lewis University, either as individuals or as members of certain committees, are managerial employees in light of the Supreme Court's decision in Yeshiva University.

In Yeshiva University, 6 the Board found that the faculty members in question were professional employees under the Act and therefore entitled to the protections of the Act, including the right to work for or against collective-bargaining representation. The Board further found that the role and authority of the faculty at Yeshiva University with respect to hiring, promotion, salary increases, granting of tenure, and other areas of governance did not confer managerial status upon these individuals.

The Supreme Court⁷ agreed with the Board that the faculty members at Yeshiva University were professional employees within the meaning of Section 2(12) of the Act. The Court also agreed with the Board that even though the individuals in question were "professionals" under the Act, they should still be excluded from coverage under the Act if they were found to be managerial employees. The Court, contrary to the Board, then proceeded to find the faculty at Yeshiva to be managerial employees and therefore excluded from coverage under the Act.

In its decision the Court reiterated the definition of managerial employees in N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 288 (1974) (quoting Palace Laundry Dry Cleaning, 75 NLRB 320, fn. 4 (1947)), as individuals "who formulate and effectuate management policies by expressing and making operative the decisions of their employer." The Court recognized that "[m]anagerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." The Court noted that while the Board had not set forth firm criteria for applying this definition to individual cases, an individual

³ This aid is in the form of Federal loans for such items as dormitory construction and research grants, and state aid for supplies and vehicles.
4444 U.S. 672 (1980).

⁵ Case 13-UC-130. The Union also filed a petition, Case 13-UC-126, asking the Board to clarify whether or not the unit members are managerial employees under the Yeshiva decision.

^{6 221} NLRB 1053 (1975).

^{7 444} U.S. 672 (1980).

^{8 444} U.S. 672, 683 (1980).

will be considered managerial only if the individual "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."⁹

The Court recognized, in Yeshiva, that the Board did not contend either that the faculty's decision-making was too insignificant to be deemed managerial, or the role of the faculty was merely advisory and thus not managerial. Rather, the Board found that the faculty members at Yeshiva University used independent professional judgment in exercising authority that otherwise could be characterized as managerial and the exercise of that judgment was in the faculty member's own interest. Therefore, since the interests of the faculty members, not the interests of the institution, were paramount, the faculty members were not managerial personnel.

In evaluating the Board's approach, the Court found that, in general, faculty members' professional interest cannot be separated from the interests of the institution if the institution depends on academic policies that largely are formulated and effectuated by faculty governance decisions. In such a situation, faculty members fall within the definition of managerial employees because they formulate and effectuate the policies of the employer. 10 The Court recognized, however, that if the faculty members' decisionmaking ability is limited to the routine discharge of professional duties, that decisionmaking ability does not constitute formulating and effectuating the policies of the employer. In those circumstances, faculty members' interests can be separated from the interests of the institution. The individuals then are not managerial employees and are covered by the Act.

In Yeshiva, the Court found that the faculty's authority in academic matters was absolute:

They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school.¹¹

The faculty at Yeshiva also played a dominant role in faculty hiring, tenure, sabbaticals, termination, and promotion.¹² The Court found that the admin-

istration at Yeshiva University "depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals." The faculty at Yeshiva University was responsible for the formulation and effectuation of academic policy; therefore the interests of the faculty members could not be separated from the interests of the institution.

Turning to the instant case, the University contends that, by means of a governance structure largely designed and implemented by the faculty, the faculty on a regular basis exercises full managerial authority over virtually all academic matters, personnel policies, and fiscal decisions. The University, therefore, argues that the faculty members are managerial personnel and not employees within the meaning of Section 2(3) of the Act. The Union contends that the faculty are statutory employees within the meaning of Section 2(3) and, further, are professional employees within the meaning of Section 2(12) of the Act. The Union further contends that, because the faculty members have no discretion in the performance of their jobs that is independent of the Employer's established policy, they do not formulate and effectuate management policies and therefore should not be excluded from coverage under the Act as managerial employees.

We agree that the faculty members of the College of Arts and Sciences at Lewis University are professional employees within the meaning of Sections 2(12) and 2(3) of the Act. Furthermore, after considering this case in light of the Supreme Court's decision in Yeshiva, we find that the faculty members, either as individuals or in their capacity as members of various committees, exercise independent judgment in the routine discharge of their professional duties, but do not effectively formulate and effectuate the policies of the Employer. Therefore, we find they are not excluded from coverage under the Act as managerial employees.

¹⁰ N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 268 (1974).

¹¹ Id. at 686.

¹⁸ Id. at 677.

¹³ Id. at 689.

¹⁴ Member Hunter's dissent focuses on that portion of the Court's decision which states that "the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise." (444 U.S. at 687.) As we stated in the case relied on by the Court, "The touchstone in a given case is whether or not a professional employee either exercises the type of discretion indicative of managerial status or, having some responsibility for authorship, participates directly in the employer's policymaking process." Community Hospitals of Sacramento, 227 NLRB 181, 193 (1976). Thus, in following the court's decision in the instant case, we are not finding that decisions based on professional judgment cannot be managerial. Rather, we find that the decisions based on professional judgment which are made by the faculty at Lewis University do not involve the type of authority indicative of managerial status. See also New York University, 221 NLRB 1148 (1975).

L COLLECTIVE-BARGAINING AGREEMENT

On April 1, 1975, the Union was certified by the Board¹⁵ and, in September 1975, executed a collective-bargaining agreement with the board of trustees, herein referred to as the master contract. The master contract expired August 31, 1978, but was extended by mutual agreement of the parties for 1 year. When a new agreement had not been reached in August 1979, the Employer continued to honor the terms and conditions of the original master contract while the parties continued negotiations. The parties arrived at a tentative agreement in the spring of 1980, but, in June 1980, in light of the decision in Yeshiva University, supra, the Employer notified the Union that it considered the 1975 master contract no longer to be in effect and repudiated the tentative agreement the parties had reached. The Employer then proposed a faculty handbook as a replacement for the master contract.

In examining the master contract, we do not view authority which faculty members exercise pursuant to the master contract as ipso facto non-managerial. Rather, the master contract merely constitutes evidence of both the Employer's and the faculty members' authority and the relationship of these two parties. This evidence, along with evidence such as, inter alia, testimony of the individuals involved and other exhibits submitted by the parties, is all considered in resolving the ultimate issue of whether the faculty members in question are excluded from coverage under the Act as managerial employees.

A review of the master contract reveals that the contract "reserved" for management the "power, right, authority, duty, and responsibility to and for the management and operation of the institution." Significantly, management has reserved to itself the areas of, *inter alia*, methods, techniques, and programs of instruction and the hiring, promotion, and discharge of faculty members.¹⁶

Further, as set forth in detail below, an examination of the master contract from the perspective of ascertaining the extent of the authority accorded faculty members indicates that faculty members are not authorized independently to formulate and effectuate academic policies, but rather perform their duties through the use of professional expertise. Moreover, the limited benefits and procedures accorded the faculty members through the master contract concern wages, hours, and working conditions, all recognized mandatory subjects of bargaining.

In light of the reservation of rights in the master contract and the currently proposed faculty handbook, and the limited authority bestowed on the faculty members through the master contract as set forth below, the master contract demonstrates that the faculty members of the College of Arts and Sciences at Lewis University were not intended to perform managerial functions or to be considered managerial employees.¹⁷

II. PROFESSIONAL ACTIVITIES IN THE CLASSROOM

A. Course Content

Faculty members are responsible to the department chairpersons for the content of the courses they teach. Deans may review all courses and recommend modifications in course content. Disagreements are resolved by the academic vice president, subject to appeal to the executive vice president.

B. Class Meetings

The master contract specifies that faculty members must obtain authorization from the dean to change either the assigned place or time of a class meeting. Furthermore, the master contract pro-

¹⁶ Case 13-RC-13639. The unit was composed of all full-time faculty within the College of Arts and Sciences including professors, associate professors, assistant professors, and instructors, and excluding all professional librarians, part-time faculty, all faculty of the College of Nursing and Continuing Education, all deans, guidance counselors, office clerical employees, guards, supervisors as defined in the Act, and all other employees.

¹⁶ Art. I, sec. C, of the master contract in full reads:

Except where expressly abridged, limited or modified by this agreement management retains and reserves unto itself all power, right, authority, duty, and responsibility to and for the management and operation of the institution. Such power and responsibility includes but is not limited to:

¹⁾ the planning, direction and control by management of all the university's operations, property, physical facilities, and equipment;

the acquisition, location and relocation by management of all the university's operations, property, physical facilities, and equipment:

the planning, development, introduction and modification of educational services and programs including new or improved methods, techniques, and programs of instruction;

⁴⁾ the recruitment, hiring, classification, assignment, scheduling, transfer, promotion, discipline, and discharge of faculty members and other employees, including the right to

a) determine the qualifications of employees

b) evaluate the performance of employees

c) determine the number of employees

d) determine the working schedules of employees

e) reassign to non-bargaining unit personnel administrative functions and duties which are now, or may be in the future, assigned to bargaining unit members

f) establish and maintain rules and regulations concerning and governing employee performance, expectations and conduct;

⁵⁾ the determination and scheduling of the academic calendar and other schedules of operation.

The limitations and modifications upon management rights established by this agreement shall be recognized only to the extent that such limitations and modifications are in accordance with the bylaws of Lewis University and any applicable laws.

¹⁷ There is no indication in the record that the faculty members' authority has been altered since the expiration of the master contract.

vides that when absence from class is necessary because of approved professional activities, such as attendance at professional conventions, arrangements to provide for the missed class must be made and these arrangements must be approved by the department chairperson and the dean. Illness or other emergency requiring a faculty member to miss class requires notification to the dean.

C. Examinations

Faculty are encouraged to give final examinations but they are not required to do so. An examination schedule is drawn up by the administration (registrar's office) and any deviations from this schedule must be approved by the dean's office.

D. Class Size

The decision on the appropriate class size is made by the dean after consultation with the department chairperson and the instructor. If the department chairperson and the instructor disagree with the dean's decision, they may appeal to the academic vice president.

E. Class Attendance

There is no mandatory University policy concerning class attendance by the students. Each instructor is free to establish individual attendance requirements.

F. Academic Honesty

The University will not tolerate academic dishonesty. All faculty are instructed to report instances of academic dishonesty to the dean.

G. Course Grading Policy

Faculty members must follow grading procedures established by the Educational Policies Committee which are outlined in the University's general catalogue. Once a grade is entered on a student's permanent record, the faculty member must make a written request to the dean for a grade change, stating the reason.

H. Analysis and Conclusion

The responsibilities and authority of the faculty members set forth above illustrate that the decisionmaking ability of faculty members concerning their primary duty, that of teaching, is limited to the routine exercise of independent professional judgment. Administrative or managerial decisions such as changing the scheduled time for class meetings or deviating from the examination schedule all require approval of the dean. Areas such as grading policies are left to the judgment of a faculty committee, but necessarily so, as one professional

duty of a teacher is the evaluation of the student's progress.

What is noteworthy, however, is that once a faculty member exercises professional judgment and evaluates the student, any change in the evaluation which would be reflected in the student's formal records must be approved by the dean. Once professional judgment has been exercised, a faculty member is not free to reconsider and change that judgment unless the administration approves.

Thus, regarding the areas set forth above, the faculty members exercise only routine professional judgment and do not formulate and effectuate any managerial policies for the University.

III. PROFESSIONAL ACTIVITIES OUTSIDE THE CLASSROOM

A faculty member's professional activities outside the classroom are also restricted by the University. Under the master contract, full-time faculty may not accept outside employment without the consent and approval of the dean and the concurrence of the academic vice president. The master contract provides for sabbaticals and academic leaves of absence, but specifically states that the awards of sabbaticals and permission for academic leaves of absence must be made by the University's president after applications have been reviewed and ranked by the dean. Furthermore, in order to qualify for a reduced teaching load for the purpose of engaging in research, a faculty member must present plans for the research to the dean. The dean and the faculty member then arrive at a mutually agreeable reduction in the individual's teaching load.

Grants from the University to assist faculty members in their research are available. The exact amount, however, is dependent on the state of the University's finances and is determined by the academic vice president. Awards of grant moneys are made by the University's president after applications have been reviewed and ranked by the Council of Academic Deans.

Thus, in these areas, faculty members do not exercise any managerial functions. Rather, the decision of who will be permitted to go on sabbatical or academic leave of absence is made by the administration, how much money and to whom it will be awarded for research projects is determined by the administration, and, finally, permission to engage in employment other than with the University is solely at the discretion of the administration.

IV. ADMINISTRATIVE ACTIVITIES

A. Curriculum

The Dean of the College of Arts and Sciences testified that faculty members can propose adding courses of study but review by the dean, vice president, president, or board of trustees is required. If a new degree is to be granted, however, it must be approved by the board of trustees as it is considered a major change. Furthermore, evidence was presented to show that the administration has unilaterally canceled at least one course in the music department because of financial considerations. Moreover, the administration has required changes in the schedule submitted by the chairman of the music department and has unilaterally canceled a section of a course. In light of this evidence, and the fact there was no evidence to indicate that the faculty members do anything other than propose new courses, we find the faculty has no actual or effective control over the curriculum.

B. Teaching Load and Salary

The teaching loads and salaries of individual faculty members have been established by the master contract. The contract provisions relevant to these areas encompass typical benefits and terms and conditions of employment such as when salary increases are awarded. The fact that these areas are determined through the negotiation process, however, does not, as set forth above, ipso facto, render the involvement of the faculty in these areas nonmanagerial. Rather, wages and hours have long been held to be mandatory subjects of bargaining. Therefore, absent evidence that the faculty members in the instant case negotiated something more than merely salary levels and teaching loads, we cannot conclude that they perform managerial functions in these areas.

C. Academic Calendar

The vice president of the University testified that he has ultimate authority concerning minor changes in the academic calendar. Any major changes must be approved by the president and the board of trustees. The decisionmaking realm of the vice president includes, within limits, such areas as days off and when the term will begin and end. The vice president further testified that he solicits advice and counsel of faculty members of the College of Arts and Sciences regarding the academic calendar. He noted, however, that because the academic calendar is for the entire University he receives advice from the deans and faculty of the other colleges, other administrators, the athletic department, and student services. After weighing all

the competing interests, the vice president determines the final academic calendar. Changes suggested by the faculty are implemented only if the vice president thinks they are appropriate. Evidence was presented to show that the Educational Policies Committee of the College of Arts and Sciences has submitted suggested changes in the academic calendar to the vice president but these changes were rejected.

In this particular area, the faculty members of the College of Arts and Sciences do not have the power to make effective recommendations. The testimony of the University's vice president clearly indicated that he seeks only the faculty's advice. Therefore, the faculty has no actual or effective control over formulating and effectuating the academic calendar.

D. Hiring Procedures

1. Faculty positions

To create a new faculty position, the department chairperson must request authorization from the vice president. The dean testified that this request is not binding on the Employer. The department chairperson must, once authority to create a new position is received from the vice president, recommend qualified candidates to the dean. The dean testified that these recommendations also are not binding on the administration. In the music department, it took several years for the request for an additional faculty member to be approved by the administration. Once permission is received, a department's recommendation as to who should be hired to fill the position has never been overruled.

There is an informal review of the department chairperson's recruiting efforts and formal review for compliance with equal opportunity and affirmative action laws. The dean testified that he always has given tacit approval of the department chairperson's recruiting strategy before the strategy is employed. A faculty member, however, testified that, on occasion, the dean has disapproved the department chairperson's strategy for recruiting new faculty members.

2. Administrative positions

On two occasions the faculty has participated in search committee activities as part of the process of selecting candidates to fill administrative vacancies. On both occasions, the faculty voted and submitted to the administration an advisory opinion as to their choice for an individual to fill the vacancies. On both occasions, the faculty's advisory opinion was not followed and a candidate other than the

one the faculty recommended was selected to fill the vacancy.

Therefore, regarding hiring, it is apparent that faculty members do not have the ability effectively to recommend when a new faculty position should be created or which candidate should be selected to fill vacancies in administrative positions. However, the faculty does effectively recommend candidates to fill vacancies on the faculty itself once the administration decides that the position can be filled. In exercising their power to recommend candidates for vacancies, however, the record is clear that faculty members make recommendations based on their professional judgment of the candidate's professional credentials. This function, standing alone, is not sufficient in our opinion to cloak the faculty members with managerial status so as to require exclusion from coverage under the Act.

E. Tenure

The evaluation of faculty members must follow the guidelines and criteria established by the Professional Status Committee of the College of Arts and Sciences. The committee meets to determine its recommendations for promotion of faculty members to higher ranks or tenure. The committee requests recommendations on tenure and promotion from the department chairperson and the academic dean. The committee's recommendations are then submitted to the academic vice president. The master contract states that the "committee recommendations will be considered most seriously by the academic vice president and the president who makes the final decisions." A faculty member who feels unjustly passed over has the right to appeal the decision to the president. An important factor which must be noted, however, is that the master contract sets forth quantitative guidelines, such as educational preparation and length of tenure in rank, for making decisions on promotions and tenure. As set forth above, the fact that these areas are determined throughout the negotiation process does not ipso facto render the involvement of the faculty in the areas nonmanagerial. Rather, educational preparation and length of tenure in rank, which is analogous to seniority, are mandatory subjects of bargaining. Thus, absent evidence that the faculty members in the instant case negotiated something more than job qualifications or seniority rights, we cannot conclude they perform managerial functions in these areas.

F. Admissions Policies

Currently there is no admissions committee. The dean testified that he has no knowledge of admissions criteria ever being voted on by the faculty.

Therefore, based on the Employer's own testimony, we cannot conclude, as do our dissenting colleagues, that the faculty members either individually or collectively determine student admission requirements.

G. Tuition

The vice president of the University testified that the faculty has no control over setting tuition levels. Rather, this is a decision left solely to the board of trustees.

V. COMMITTEE SYSTEM

The master contract established four committees with specific powers and limitations: the Faculty Life Committee (the Union), the Professional Status Committee, the Budget Review Committee, and the Educational Policies Committee. The Employer's petition seeks to exclude from the appropriate unit all faculty members who are members of the latter three committees.

The board of trustees has also established several standing committees which include university faculty as members. The Employer contends that membership on these committees renders the individual faculty members managerial employees under the decision in Yeshiva University, supra. The Employer's petition thus requests the Board to exclude from the collective-bargaining unit the members of the following standing committees of the board of trustees: University Academic Affairs Committee, Student Union Advisory Board, Student Conduct Committee, Communication Advisory Board, Teacher Education Committee, Faculty Advisory Committee for Title III Grants, Graduate Council, Finance Committee, Student Affairs Committee, Development Committee, and the Academic Affairs Committee. 18

A. Professional Status Committee

The Professional Status Committee (herein PSC) establishes criteria covering the evaluation of department faculty and department chairpersons. The PSC also makes recommendations to the University's president regarding candidates for tenure and promotion. Any recommendation of the PSC must be approved by the dean, vice president, or president, and, in matters of tenure and promotion, the board of trustees makes the final decision. Furthermore, there is a procedure whereby the president can overrule a denial of tenure made by the PSC. During the last 10 years, 72 candidates sought pro-

¹⁸ Members of the Development Committee and Academic Affairs Committee were not included in the Employer's original petition but were added by amendment at the hearing.

motion. The PSC voted affirmatively on 70 of them and the University's president rejected 2 of the 70. During the same time period, 42 faculty members sought tenure and the PSC recommended 37 of them. The president disagreed with three or four of the PSC's recommendations and denied tenure accordingly.

When PSC exercises its duties regarding establishing criteria for the evaluation of department chairpersons, its proposals must be presented to the faculty assembled for approval. If the majority of the faculty accepts the PSC's proposals, the recommendations must then be reviewed by the academic vice president. The academic vice president testified that once he reviews the recommendations of the PSC, he seeks advice from the dean and then makes his own recommendations to the University's president. The vice president further testified that.

I did not think it was appropriate for me to inform the committee of any recommendation right after I had made it. The reason for that is that because what we have is an ongoing process and there is really no decision made until the president finally acts. It could very well be that I would inform an individual that I had recommended no in the matter of tenure or promotion and the president could, and in fact, has in the past overruled my recommendation or made a recommendation and taken action counter to that.

Based on the Employer's own testimony, it thus appears that this committee, through the routine use of its professional expertise, submits recommendations which are scrutinized by the administration and then accepted or rejected. While our dissenting colleague, Chairman Van de Water, apparently agrees that this committee only formulates recommendations, in light of the Employer's testimony quoted above, we are puzzled as to how this conduct could render the committee members managers. It is clear that the functions of this committee are not sufficient to cloak the faculty members with managerial status so as to require exclusion from coverage under the Act.

B. Budget Review Committee

The testimony of the dean indicates that the Budget Committee initially established by the master contract is a review committee, not a composition committee. The various departments submit requests to the administration's budget officer, who then compiles these requests into a universitywide budget. The product of the budget officer's work is then reviewed by various adminis-

trators. The budget is then presented to the board of trustees for their approval. Once approved by the board of trustees, the allocated amounts are given to the respective departments who disburse the funds.

The Budget Committee is informed of the outer limits of their allotment and then asked to review a complete or final budget. Once the budget goes through the entire process set forth above, it is up to the departments to administer it within the set limits. Requests for funds in excess of those contained in the budget have been denied by the University's vice president.

Based on this evidence, it does not appear that faculty members, as members of the Budget Review Committee, have the ability to formulate and effectuate university policy concerning development of the University's budget.

C. Educational Policies Committee

The role of the Educational Policies Committee (EPC) of the College of Arts and Sciences is to study and make recommendations to the faculty of the College of Arts and Sciences concerning academic governance.

This committee reviews all proposed changes in academic programs, policies, and procedures. Once the committee has agreed upon a recommendation, the proposal is submitted to the faculty as a whole for approval. If the faculty as a whole approves the proposal, the recommendation is then submitted to the University Academic Affairs Committee (UAAC). The UAAC is composed of representatives of the Educational Policies Committee of all three colleges and reviews recommendations from all three colleges. If the UAAC accepts the recommendation, it is then presented to the University's president. 19 The evidence indicates that there have been several occasions when the recommendations of the EPC have failed to attain acceptance by the administration. The EPC does not effectively formulate and effectuate policies of the University. Rather, the faculty members who serve on the EPC simply evaluate and recommend to the faculty as a whole proposals submitted by either the administration or individual faculty members.20

¹⁹ In its brief, the Employer submits a statement of its president, who created the UAAC, which indicates that the president had no intention of passing on any recommendation of the Educational Policies Committee until it had been studied by the universitywide and administratively created UAAC. This statement implicitly acknowledges that the EPC initiates only recommendations, not binding policies. This statement, apparently not given any weight by our dissenting colleague, Chairman Van de Water, implicitly acknowledges that the EPC initiates only nonbinding policies.

²⁰ Contrary to Member Hunter's evaluation, we do not rely on the fact that the EPC's recommendations lack finality in finding that the commit-Continued

D. Student Union Advisory Board

The duties of the members of this committee consist of selecting the managers of the student union and reviewing the budget and expenditures of the student union. The testimony of the University's vice president indicates that the recommendations of this committee are usually followed by the administration. The critical factor, however, is that the committee is composed of eight members, only two of whom are faculty members. Further, only one of the two faculty members is from the College of Arts and Sciences. Moreover, the role of the faculty member is only to provide advice. We find that the faculty member who sits on this committee does not exercise sufficient managerial authority to require exclusion from coverage under the Act.

E. Student Conduct Committee

The members of this committee hear charges which have been brought against students for infractions of the rules. The committee has only convened seven times. It does not determine guilt or innocence, but only makes a recommendation to the dean who is charged with imposing the proper sanction. The student then has the right to appeal both the committee's recommendation of guilt and the sanction imposed by the dean. All seven cases heard by the committee resulted in a finding of guilty. Six were appealed and four of the appeals were denied by the University's vice president. In the remaining two appeals, the sanction imposed by the dean was altered. It should also be noted that the student has the prerogative of choosing whether the disciplinary action should be heard by this committee or by the dean of students. It thus appears from the record that the faculty members serving on this committee do not effectively formulate and effectuate the policies of the Employer. They do not perform the function of setting a sanction and their actions can, and have been, appealed to the dean.

F. Communications Advisory Board

This committee selects editors and managers for the campus media and establishes guidelines regarding both the quality and development of campus

tee members are not managerial. We recognize the Court's holding that "an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." (Emphasis supplied.) N.L.R.B. v. Yeshiva University, 444 U.S. at 683. It is clear that even though, in many areas, faculty members are empowered to make recommendations, these recommendations do not effectively control or implement employer policy. Thus, contrary to the dissent's interpretation of our position, it is this aspect of the faculty members' authority that is determinative of their nonmanagerial status, not the fact that their recommendations are nonbinding.

media. These guidelines, in the form of policy recommendations, are then submitted to the dean for approval. As with the Student Union Advisory Board, only one out of six or eight committee members is a faculty member. While the recommendations of this committee are usually not reversed, it is apparent that, because only one member is a faculty member, this member could not effectively formulate and effectuate the Employer's policies.

G. Teacher Education Committee

The duties of this committee consist of setting and publishing to the university community requirements for admission to and retention in the teacher training program. Furthermore, this committee monitors compliance with the state and Federal teacher training requirements in addition to approving stipends to visiting professors or teachers. However, this committee does not establish degree requirements. Rather, the two main functions of the committee are approving students for the program and approving students for practice teaching. This latter duty encompasses certifying students who have completed the program. In carrying out these routine duties, the members of the committee employ only their professional judgment in determining which students are fit to enter into the program, and which students have successfully completed the program. The members of this committee, therefore, do not formulate and effectuate the Employer's policy in this area.

H. Standing Committees of the Board of Trustees

The board of trustees has four remaining standing committees: Finance Committee, Student Affairs Committee, Development Committee, and Academic Affairs Committee.²¹ The Employer contends that because these committees make recommendations to the board of trustees which are usually followed, the faculty members on the committee have the power effectively to recommend managerial decisions and therefore are not employ-

³¹ The Employer has also requested that the members of the University Academic Affairs Committee be excluded from the unit. The record is unclear whether the University Academic Affairs Committee is a different committee from the board of trustees Academic Affairs Committee. Assuming, arguendo, that these two committees are distinct entities, the Employer has failed to meet its burden of proving that the members of the University Academic Affairs Committee perform managerial functions and therefore should be excluded from coverage under the Act as managerial employees. Further, the record also contains insufficient evidence concerning the duties and functions of the Faculty Advisory Committee for Title III Grants and the Graduate Council. Therefore, we find that the Employer has failed to meet its burden of proving that the members of these committees perform primarily managerial functions and should be excluded from coverage under the Act as managerial employees.

ees. An important fact which the Employer fails to note, however, is that according to the testimony of the Employer's own witness, the vice president of the University, the faculty members on these four committees are not entitled to vote. These faculty members can not make effective recommendations in a managerial sense; all they are entitled to do is offer an opinion, not make the essence of their opinion felt by casting a vote. The faculty serving on these committees are thus unquestionably observers who are present only in a most perfunctory sense of committee membership.²²

VI. FACULTY CONVENED

The Employer has further requested that all faculty members who are entitled to sit and vote at meetings of the faculty convened be excluded from the unit as managerial employees in light of the Yeshiva decision.²³

The evidence indicates that the faculty as a whole convenes once a month. During these meetings, reports of the three committees established by the master contract are presented and voted upon. The meetings are chaired by the academic dean, although the dean does not have the power to vote. Once the faculty convened has voted to approve a proposal of one of its committees, it is required that the proposal be sent to the administration for review at several levels. Evidence indicates, however, that the vote of the faculty convened and the powers of the committees established by the faculty convened are advisory and may or may not be followed. They do not exercise discretionary managerial authority on behalf of the Employer. Therefore, we find that the duties and powers of the faculty convened do not involve formulating and effectuating the Employer's policies. Thus the faculty members of the College of Arts and Sciences entitled to vote at meetings of the faculty convened should not be excluded from this unit as managerial employees.

VII. DEPARTMENT CHAIRPERSONS

The Employer has further requested that faculty members who hold the position of department chairperson be excluded from the unit as managerial employees.

The College of Arts and Sciences is divided into 16 departments, each of which is headed by a chairperson. The department chairpersons are selected by a vote of the faculty members of the respective departments. This selection must then be

approved by the dean. The selection of the faculty is usually followed by the dean, although the University's president has disqualified a faculty member from becoming a department chairperson due to the individual's health. The department chairperson is subsequently evaluated by the dean within guidelines established by the Professional Status Committee, but the dean has never dismissed anyone.

The department chairpersons serve on the department chairpersons committee but the record contains little evidence to indicate that this committee effectively controls and implements the Employer's policies. The dean for the College of Arts and Sciences testified that it is the practice of the administration to approve decisions made by the department chairperson committee. However, when the committee requested the University's president to remove a dean from office, the request was vetoed by the dean.

Concerning the creation of new faculty positions, the dean testified that the department chairperson may request a new position, but authority to do so is limited solely to a nonbinding request. The evidence indicated that, at least on one occasion, the administration denied a department chairperson's request for an additional faculty position. If a vacancy arises in an already-existing position, the department chairperson, together with the dean, must seek approval from the academic vice president to fill it. Once approval is received, the chairperson begins recruiting efforts, which are informally reviewed by the administration. A formal review to assure that the recruiting efforts comply with EEOC and affirmative action regulations is also undertaken by the administration. There was testimony which indicated that on occasion the dean has disapproved the department chairperson's strategy for recruiting new members. Applicants are then interviewed by both the dean and the department chairperson, who submits a recommendation to the dean. The recommendation of the department chairperson also includes the views of other members of the department. These recommendations are usually followed. The dean further testified that the hiring of part-time faculty members is done generally at the recommendation of the department chairperson.

We agree with our dissenting colleague, Chairman Van de Water, that the department chairpersons also make recommendations on tenure and promotion to the Professional Status Committee. What is relevant, however, which our dissenting colleague has chosen to ignore, is that these recommendations have been rejected in the past because they did not conform to the quantitative require-

⁸² It should be noted that the Development Committee does not have even a nonvoting representative of the faculty of the College of Arts and Sciences.

Sciences.

23 This request was not contained in the Employer's original petition but was added by amendment at the hearing.

ments of the master contract. Further, it is important to note, although once again ignored by our dissenting colleague, that, while department chairpersons have the authority to recommend individuals for faculty vacancies, they have no control over the rank or salary of new faculty members as this is also governed by the master contract.

The dean consults with the department chairpersons concerning sabbaticals and leaves of absence and has never disagreed with the department chairperson's recommendations.

Department chairpersons receive additional compensation for their duties, but the extent of the compensation is determined by the dean with the approval of the University's vice president.

Department chairpersons also submit a course schedule for their department. Evidence indicates, however, that the administration has required changes in the schedules and requested time changes in certain courses.

Concerning budgetary matters, the department chairperson's authority is restricted to submitting budget requests to the administration's budget officer and administering the budget for their department within prescribed limits.

Neither decisions as to salary levels, tenure, teaching loads, promotion, termination, nor the day-to-day work of the faculty members are effectively controlled by the department chairpersons. Furthermore, department chairpersons do not effectively control the number²⁴ of faculty members within their department, the students admitted into the department, or the amount of funding the department receives. Additionally, the faculty members who, inter alia, discover instances of academic dishonesty, wish to change a grade entered on a student's permanent record, deviate from the examination schedule, accept outside employment, qualify for a reduced teaching load for the purpose of engaging in research, or receive grants for research deal directly with the dean, not their department chairperson.

We therefore find that faculty members who hold the position of department chairperson do not formulate and effectuate the Employer's policies and thus should not be excluded from the unit as managerial employees.

VIII. PROGRAM DIRECTORS

The Employer also has requested that faculty members who hold the positions of program directors be excluded from the unit as managerial employees.²⁵

The College of Arts and Sciences has seven programs which function independently and nine programs which function within various departments.26 Each program has a director who is selected by the academic dean. The dean testified that he employs the advice of other faculty members in selecting program directors. Program directors are responsible for putting together specialized courses of study. Once the proposal for the program is drawn up, it is submitted to the academic dean who reviews it. Testimony of the dean indicates that he has changed the program proposals submitted to him on various occasions for various reasons. This testimony of the dean clearly indicates that the role of a program director is to employ professional judgment in specific areas to formulate specialized academic programs. Program directors, however, do not effectively control and implement the Employer's policies concerning their programs as the administration must review their proposals and has, on occasion, instituted changes in the proposals.

We, therefore, find that faculty members who hold the position of program directors should not be excluded from the unit as managerial employees.

Conclusion

Based on all of the above, we find that the faculty members of the College of Arts and Sciences at Lewis University function in a role different from that of the faculty members at Yeshiva University. At Yeshiva University, the faculty exercised absolute or dominant authority in numerous critical areas including academic matters, hiring, tenure, sabbaticals, termination, and promotion. At Lewis University, the role of the faculty in these areas is neither absolute nor dominant. The faculty members either utilize their professional expertise and make routine recommendations or the policies are established and implemented pursuant to the master contract. Like the faculty members at Yeshiva University, the faculty members in the instant case do determine the content of, and how to teach, courses; but they do not decide, as does the faculty at Yeshiva University, grading policies, matriculation standards, academic calendars, or which stu-

²⁴ Chairman Van de Water's dissent places emphasis on the fact that department chairpersons are responsible for making library requisitons. This duty represents the essence of teaching: Using professional judgment to foster a student's learning. There is no evidence that department chairpersons set the budget for the library, determine how many books each department may requisition, or in any other manner administratively become involved in the operation of the library beyond recommending, through the use of professional judgment, which books the library should acquire.

²⁸ This request was also denied by amendment at the hearing.

²⁶ These programs encompass such areas as Ethnic Studies, Journalism, Pre-Law, Theatre, and Women Studies, in addition to graduate studies in Education and Social Justice.

dents will be admitted, retained, or graduated. Further, in contrast to the authority of the faculty members at Yeshiva University, Lewis University's faculty members do not determine the size of the student body, the tuition to be charged, or the location of the school. Moreover, unlike the faculty members at Yeshiva University, the limited and routine decisionmaking authority of the faculty members at Lewis University, such as recommending candidates for faculty vacancies, is too limited to be deemed managerial.²⁷

Here, the faculty members in question have little discretion to perform their jobs independent of the Employer's established policy. Rather, the record indicates that the university administration's authority dominates the decisionmaking process. The dominance of administration decisionmaking authority is unequivocally articulated in the management-rights clause contained in the master contract which reserves to management "all power, right, authority, duty and responsibility to and for the management and operation of the institution." It is further recognized by the University's president, who, after being asked to describe the obligations and responsibilities of the board of trustees, replied:

They are responsible for the financial aspects of the institution. . . . Establishing policy, programs and for hiring the president. . . . They are legally obligated to run the institution. . . . they establish the total policy direction of the institution. ²⁸

Certainly, by routinely discharging professional duties through the use of professional expertise, and by participating on various university committees, the faculty members are able, to some degree, to influence the policies and institutional goals of Lewis University. However, the University's administration has retained for itself decisive power and authority to formulate and effectuate manage-

ment policy. Thus, faculty members do not formulate and effectuate the policies of the Employer to an extent that would require excluding them from coverage under the Act as managerial employees.

In accordance with the above, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time faculty employees employed by the Employer in the College of Arts and Sciences of Lewis University, now located in Lockport, Illinois, including professors, associate professors, assistant professors and instructors excluding all professional librarians, part-time faculty employees, all faculty employees of the College of Nursing, Business and Continuing Education, all deans, guidance counselors, office clerical employees, guards, supervisors as defined in the Act and all other employees.

In view of the foregoing and the entire record in this proceeding, we find that the employees sought to be excluded from the unit in the Employer's unit clarification petition are properly included in the unit and we shall therefore dismiss the UC petitions filed by the Employer and the Union.

ORDER

It is hereby ordered that the UC petitions filed by the Employer and the Union be, and they herby are, dismissed.

CHAIRMAN VAN DE WATER, dissenting:

I agree with my colleagues that the Board should assert jurisdiction over the Employer.²⁹ However, for the reasons set forth hereafter, I disagree with their conclusion that faculty members in the College of Arts and Sciences are not managerial employees.

As noted, the College of Arts and Sciences is divided into various academic departments, each of which is headed by a chairperson who is elected for a 2-year term by the faculty members of that department. The academic dean and the University's president must approve the selection of a department chairperson, but the record shows they have never vetoed a faculty's selection of its chairperson. Annual evaluation of each chairperson is done by the dean of the college, who has never dismissed a chairperson.

⁸⁷ In its brief, Respondent also contends that faculty members are supervisors within the meaning of Sec. 2(12) of the Act. Based on the record in the instant case, faculty members do not possess the required authority and responsibilities to be deemed statutory supervisors. Furthermore, the record indicates that faculty members do not make effective recommendations with respect to the hiring and change of status of other faculty members. These areas are at least partially controlled by quantitative guidelines set forth in the master contract. See Fordham University, 193 NLRB 134 (1971). The record also fails to establish that faculty members spend a sufficient portion of their time directing nonunit departmental support personnel so as to render them statutory supervisors.

With respect to department chairpersons, the record indicates they do not effectively control either the number of faculty members in their department or the day-to-day work of the faculty members in their department. As set forth above, department chairpersons do have the ability to recommend individuals for faculty vacancies, but they have no control over the rank, salary, teaching load, promotion, or termination of faculty members. We therefore find that department chairpersons are not supervisors within the meaning of Sec. 2(12) of the Act.

²⁸ This testimony is yet additional evidence which our dissenting colleagues fail to note.

In so doing, I do not rely on the fact that it is not church operated. I simply find that the teaching of religious courses is incidental to the operation of the University and there is little likelihood that first amendment rights will become entangled with union representation of the faculty.

A department chairperson, in addition to his duties as a faculty member, has administrative responsibilities which are discussed *infra*; he is compensated for these extra duties by the receipt of a stipend or by the reduction of his teaching load.

The University is governed by a faculty governance system within the College of Arts and Sciences, designated as the faculty convened. All faculty members are entitled to vote on matters presented to the faculty convened. The academic dean presides at these meetings but has no voting power. The faculty convened has been entrusted with the responsibility for the formulation of all major educational policies of the University. To that end, it has established several faculty committees.

The Educational Policies Committee deals with academic matters and makes recommendations concerning student admission and graduation requirements, grading guidelines and policies, majors, programs and courses to be offered, and curriculum changes. For example, this committee recently recommended that a new degree be offered. The Professional Status Committee is concerned with matters pertaining to the faculty and makes recommendations as to promotions, tenure, and faculty evaluation. Denials of promotion and tenure by this committee are binding. The Budget Review Committee is responsible for review of budgets prepared by department chairpersons.

Each of these committees³¹ formulate proposals which are then presented to the faculty convened for its approval. Approved proposals are then received by the dean and submitted to the University's president. Although the president may veto such recommendations, the faculty convened may override the veto and submit the matter directly to the board of trustees. Once formerly adopted by the administration, proposals advanced by the faculty convened become the official policy of the university.³²

Faculty members as individual instructors are, of course, responsible for many aspects of the educational process. They determine and teach course content, administer and grade examinations, advise

³⁰ If an academic matter affects a single department rather than the entire school, a decision of the Educational Policies Committee is binding

their chairperson what textbooks are required, and serve as advisors to students and student organizations. Faculty members also test incoming students to determine which courses they will take.

Some faculty members serve as department chairpersons with overall responsibility for insuring that university policies and regulations are followed within their departments. Department chairpersons have specific responsibilities in the following areas: (1) they supervise instruction to the extent of making recommendations as to teaching, testing, and grading methods, and insure that department and course objectives are met; (2) they evaluate all department faculty members utilizing a faculty-devised evaluation system and submit these evaluations to the dean; (3) they make library requisitions, and make departmental recommendations and reports to the dean; and (4) they advise students and faculty. In addition, the department chairperson submits to the dean suggestions and recommendations as to new faculty appointments, as well as the retention,33 promotion, and salary increases of departmental faculty. A department chairperson also prepares the budget for his department and approves departmental expenditures.

With regard to the hiring of new faculty members, the process begins with the request of the chairperson that someone be hired. Approval for the position comes from the academic vice president; the chairperson then recruits, interviews, and evaluates individuals for the position. A recommendation to hire a particular person is then made to the dean. The record reveals that departmental recommendations as to the hiring of new faculty members made since 1971 have not been rejected.34 Chairpersons also have authority to recommend that faculty be promoted, be given tenure, not be reappointed, or that a faculty member be permitted to go on sabbatical. These recommendations are invariably adopted by the dean. In addition, the chairperson prepares the semester's schedule of classes, and decides which faculty member will teach which course at what time and to which stu-

Department chairpersons are also involved in the budget process. Each department is given a specific amount of money to spend as the chairperson determines. The dean has never vetoed a budget which is then sent to the budget review committee which forwards the budget to the academic vice president. The academic vice president has sent a

ing.

31 Other committees include the Teacher Education Committee which approves students into the teacher training program and approves such items as practice teaching and who will eventually be certified to teach. In addition, there is a Graduate Council which determines graduate degree courses and sets requirements for obtaining a graduate degree. This committee also screens faculty members to determine who will teach graduate courses. Finally, there is a Department Chairpersons Committee which discusses and votes on academic policies. The administration routinely approves decisions made by this committee.

³² In the past 10 years, the administration has adopted and implemented the majority of proposals formulated by the faculty convened. Among these have been a complete curriculum revision.

³³ In one instance, a department chairperson requested that a faculty member be permitted to teach beyond the retirement age. This request was approved by the University's president.

³⁴ The hiring of part-time faculty is much less formal and is generally carried out at the sole request of the department chairperson.

budget back only for further information or to request the postponement of a purchase.

The Employer asserts that all full-time faculty members are managerial employees within the meaning of the Supreme Court's Yeshiva decision. The Employer points to the following passage from N.L.R.B. v. Yeshiva University³⁵ as being particularly applicable:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

The Court thus found that the Yeshiva faculty effectively determined the curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. The Court additionally noted that the faculty's authority extended beyond strictly academic areas to such matters as hiring, tenure, sabbaticals, terminations, and promotions. Although the Yeshiva administration retained the authority to make final decisions on many matters, the Court found that the overwhelming majority of faculty recommendations were followed. Based on its findings, the Court held that faculty members at Yeshiva exercised managerial authority and were, therefore, exempt from the coverage of the Act.

In my opinion, the faculty members at Lewis University are, in fact, managerial employees. I do agree with my colleagues that certain activities engaged in by individual faculty members in their capacity as instructors are in furtherance of their primary duty of teaching. However, when the faculty comes together as a whole to sit as the faculty convened, it possesses and exercises managerial authority similar to that of the Yeshiva faculty. The faculty convened determines student admission require-

ments, what programs shall be offered, and what degree will be awarded to whom. It decides grading standards and graduation requirements. The faculty convened determines, in conjunction with their department chairpersons, what courses shall be offered, to whom, and at what time. The record reveals that the faculty convened, through the various standing committees, and with their department chairpersons, has extensive authority to formulate and effectuate academic policies for the University.

In addition, the faculty possesses substantial authority in spheres beyond the strictly academic. Thus, the faculty controls the hiring of new faculty as well as the promotion and tenure of existing faculty. They also have an effective voice in budgetary matters.

In view of all of the foregoing facts and the record as a whole, I find that the unit sought by the Union-Petitioner is composed of managerial employees. Accordingly, I would dismiss the petition.³⁶

MEMBER HUNTER, dissenting:

I join in the Chairman's findings as set forth in his dissent. However, examination of his dissent as contrasted with the majority's decision might well cause one to question whether the Chairman and the majority read the same record. Because I believe this apparent disparity in factual findings is really the inevitable result of the divergent analytical approaches taken by the majority and the dissent, I think it is important to set forth the specific grounds for my disagreement with the majority.

Throughout the majority's decision, three analytical devices are used, singly or in combination, to avoid the conclusion that certain authority exercised by the faculty is sufficient to confer managerial status upon it. Thus, where the Chairman and I see evidence of managerial authority, the majority sees either (a) authority with respect to mandatory subjects of bargaining embodied in the parties' master contract, (b) mere exercise of professional judgment, or (c) authority only to make nonbinding recommendations. In my estimation, each of these facets of the majority rationale is critically misguided and without basis in law.

Taking the first of these approaches, the majority dismisses the faculty's authority with respect to, *inter alia*, teaching loads, faculty salaries, promotion, and tenure, on the ground that these matters are mandatory subjects of bargaining covered by

^{35 444} U.S. 672 at 686.

³⁶ Since I have concluded that the faculty members are managerial employees, I find it unnecessary to reach the issue of whether department chairpersons are also supervisors within the meaning of Sec. 2(11) of the Act.

the master contract. We are not told why this fact should entail the further proposition that any authority which the faculty exercises in these areas is necessarily nomanagerial, and I see no reason to reach such a conclusion. Indeed, the origins of a faculty's authority are irrelevant to the question of whether that authority establishes the faculty as managerial. For example, it is not at all inconceivable that faculty members who initially hold employee status may bargain themselves out of that status if, during negotiations, they succeed in winning from the administration authority sufficient to permit them "to formulate and effectuate management policies by expressing and making operative the decisions of their employer."37 And the fact that such authority pertains to "mandatory subjects of bargaining" and is expressly conferred on the faculty in a collective-bargaining agreement, rather than being the result of informal or historical practice or understanding, makes not a whit of difference.38

Further, the majority's position is internally inconsistent. Thus, while finding that any authority which the faculty exercises with respect to "mandatory subjects of bargaining" by virtue of the master contract is ipso facto nonmanagerial, the majority also relies on the master contract to establish that the administration has sole authority for the management and operation of the institution. The majority cannot have it both ways; if authority left to the administration by the master contract is indicative of its managerial authority, the same must be true where the master contract assigns authority to the faculty.

A second strategy employed by the majority to downplay the authority of the faculty is to denominate various decisionmaking processes as "merely the exercise of professional judgment." A number of managerial functions receive short shrift on this basis, among them the hiring of new faculty members, the functions of the Professional Status Com-

mittee in assessing candidates for tenure and promotion, and the actions of the Teacher Education Committee in setting and administering requirements for admission to and retention in the program of practice teaching, as well as the certification of students who have completed the program. The majority's reliance on the "professional judgment" rubric again flies in the face of Yeshiva. The Court there noted that:

Outside the university context the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise. Indeed, the Board has twice implicitly rejected the contention that decisions based on professional judgment cannot be managerial.²⁶

In my view, it cannot seriously be contended that faculty recommendations as to hiring new faculty members, granting tenure or promotions, or establishing the educational policies of the University constitute "routine" exercise of professional judgment. Clearly, the Supreme Court found to the contrary in assessing the managerial status of the faculty in Yeshiva. Moreover, the Board's own post-Yeshiva decisions have relied on similar evidence of faculty participation in decisions concerning hiring, promotions, tenure, and educational policymaking to find managerial status, and they have done so without any effort to show that something more than or different from "professional judgment" was required.⁴⁰

A third aspect of the majority's approach is its reliance on the "nonbinding" nature of faculty recommendations concerning faculty promotions, the granting of tenure, establishment of educational policy, selection of chairpersons, creation of new faculty positions, recruiting of new faculty members, and the entire range of actions taken by department chairpersons, program directors, the Educational Policy Committee, and the faculty convened. The majority appears to believe that it has the liberty to find controlling the fact that such recommendations are not "final." It is not free to do so. The Supreme Court has clearly and conclu-

³⁷ N.L.R.B. v. Yeshiva University, 444 U.S. 672, 687 (1980), quoting N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 288 (1974), in turn quoting Palace Laundry Dry Cleaning Corporation, 75 NLRB 320, 323, fn. 4 (1974).

³⁸ Moreover, if the faculty exercises such authority, then of course there are no mandatory subjects of bargaining, because the Employer is under no obligation to bargain with a representative of its managerial employees. The majority's approach thus assumes its conclusion, and by such circular reasoning obscures the real issue, which is the degree of authority exercised by the faculty. I note also that in placing heavy reliance on the language of the contract, in the face of record evidence which more reliably establishes the faculty's authority, the majority departs from the Board's traditional approach. Thus, for example, in determining whether individuals are independent contractors or Sec. 2(3) employees, the Board has consistently and expressly looked beyond conclusionary contract language to the actual practice of the parties. See, e.g., National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc., 153 NLRB 1536, 1538-39 (1965); Merchants Home Delivery Service, Incorporated, 230 NLRB 290 (1977).

²⁶ University of Chicago Library, 205 NLRB 220, 221-222, 229, (1973), enf'd, 506 F.2d 1402 (CA 7 1974) (reversing an Administrative Law Judge's decision which had been premised on the "professional judgment" rationale); Sutter Community Hospitals of Sacramento, 227 NLRB, at 193 (excluding as managerial a clinical specialist who used interdisciplinary professional skills to run a hospital department).³⁹

³⁹ N.L.R.B. v. Yeshiva University, 444 U.S. 672, 687 (1980).

⁴⁰ Cf. Ithaca College, 261 NLRB 577 (1982); Thiel College, 261 NLRB 580 (1982); Duquesne University of the Holy Ghost, 261 NLRB 624 (1982).

sively spoken to this issue in Yeshiva and this Board is bound to follow the teaching of the Court in that case. The Court there held that "an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy"41 and further that "the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority."42 Although the majority pays lip service to this standard, it repeatedly finds, in the areas noted above, that because the administration had vetoed or modified some recommendations, none are effective. To cite just two of the many instances of this error, we are told that the department chairpersons' authority to request new faculty positions is limited to making "nonbinding requests," a conclusion apparently based solely on the fact that one such request was denied. Similarly, because the proposals approved by the faculty convened "may or may not be followed" (though we are told of no instance in which they were not followed), the majority concludes that body does not exercise "discretionary managerial authority on behalf of the Employer" and on that basis finds "that the duties and powers of the faculty convened do not involve formulating and effectuating the Employer's policies." Aside from the fact that the majority here puts the test backwards, it again reaches its conclusion by applying a standard which it purports to reject. In order for the distinction between "effective recommendation" and "final authority" to have meaning, the former term must be understood to denote the sort of recommendation which, though nonbinding, is shown a degree of deference by the administration and is generally followed. Review and occasional veto by administration officials does not establish that the authority under which the faculty makes such recommendations is less than managerial. Thus, the majority's pivotal reliance on the fact that many faculty recommendations are "nonbinding" or subject to modification is a clearly impermissible departure from the law as set forth by the Supreme Court in Yeshiva.

In conclusion, once the majority's analysis is examined in light of the approach mandated by the Supreme Court in Yeshiva, no basis whatsoever remains for finding that the authority exercised by the faculty here does not constitute them as managerial personnel. Accordingly, I would revoke the Union's certification, and I join the Chairman in dissenting.

N.L.R.B. v. Yeshiva University, 444 U.S. at 683 (emphasis supplied).
 Id. at 683, fn. 17.